Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Replacement of Part 22 and Part 90	)	WT Docket No. 96-18
of the Commission's Rules to	)	
Facilitate Future Development of	)	
Paging Systems	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF METROCALL, INC.

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Date: March 18, 1996

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SUMMARY

Metrocall generally supports the FCC's proposal to issue wide-area licenses for paging services, and to permit wide-area licensees to make modifications without prior FCC approval throughout their geographic areas. However, Metrocall submits that BTAs, rather than MTAs, most closely reflect the actual development of wide-area paging systems. Issuing paging licenses on an MTA basis would require licensees to bid for and build out large geographic areas in which there may be little or no demand for paging services; the costs of that procedure would likely be prohibitive for many licensees. The FCC should also be mindful of the incumbent presence in many markets; where an existing licensee is providing such substantial service to a geographic area that no other wide-area system could be instituted on that frequency in that area, the incumbent licensee should be permitted to qualify for a wide-area authorization without being subjected to the auction process.

The FCC must take particular care in crafting its rules to not deprive incumbents of their rights under their existing licenses. No changes should be made to the calculations for service and interference contours. The NPRM's proposals, which significantly reduce the current interference protection for paging licensees, would unlawfully modify validly issued licenses, and severely harm paging incumbents and their subscribers.

The FCC should also decide pending 929 MHz exclusivity requests and slow growth waivers under the existing rules. In the more than two years since the adoption of those rules, many licensees have applied for exclusive systems, been coordinated by PCIA, and have invested substantial sums in building out their systems in reliance on the existing rules; others have waited patiently for the FCC to grant waiver requests before commencing construction.

These licensees should not be deprived of their good faith investments, made in compliance with the FCC's rules, simply because the FCC had not acted on their requests prior to instituting this proceeding.

In adopting auction rules, the FCC should ensure that auctions are held only for legitimate "MX" situations. Simultaneous multiple round auctions for paging licenses would be far too complex and costly for both the FCC and for applicants. The current Part 22 rules should be modified to allow for the filing of applications for wide-area authorizations in the same manner that paging applications have traditionally been filed; those applications would then be placed on Public Notice and subject to competing applications. Only where a mutually exclusive application for the MTA or BTA in question is filed would an auction be held.

Wide-area paging licenses should not be subject to eligibility restrictions or spectrum caps. Paging is a highly competitive industry; there is no need impose artificial government restraints on that industry now.

The maturity and competitiveness of the paging industry also militates against applying the FCC's anti-collusion rules and transfer disclosure requirements in any manner that would restrict legitimate mergers and acquisitions among paging licensees. Pending or planned transactions among licensees should not be impaired simply because of upcoming auctions, and post-auction assignments and transfers by incumbent licensees do not raise the trafficking issues that may be present when a newcomer-auction winner assigns or transfers its license. Licensees should also be allowed flexibility to partition their geographic service areas, and enter into joint ventures, intercarrier arrangements, purchase agreements, or any other transactions that the marketplace dictates.

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COMMENTS OF METROCALL, INC.

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Commission's Notice of Proposed Rule Making[1] ("NPRM") in the above-captioned proceeding.

I. Statement of Interest

Metrocall is one of the largest publicly traded paging companies in the nation (NASDAQ trading symbol: "MCLL"). Through its licensee-subsidiary, Metrocall USA, Inc., Metrocall provides radio common carrier ("RCC") paging and private carrier paging ("PCP") services throughout many areas of the United States. Through its corporate predecessors, Metrocall has provided paging services for more than a decade, and it continues to undergo tremendous growth. Metrocall's RCC facilities serve the Northeast, Mid-Atlantic and West Coast, and it is in the process of expanding that network throughout the Southeast, Southwest and other regions of the country through "new" applications and through acquisitions. On two 929 MHz PCP

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[1] FCC 96-52 (released February 9, 1996).

frequencies, Metrocall has qualified for nationwide exclusivity, and is in the process of building out its nationwide networks[2]; Metrocall has also qualified for regional exclusivity on a third 929 MHz frequency. Over its RCC and PCP facilities, Metrocall currently has approximately one million subscribers, and is actively pursuing business plans to increase its customer base nationwide.

As a paging company whose business will be profoundly affected by the Commission's wide-area licensing and auction proposals, Metrocall clearly has standing as a party in interest to file comments in this proceeding. Moreover, as a long-time paging licensee that has grown from a small, closely-held family business to a prominent, publicly-held corporation, Metrocall is well-qualified to comment on the proposals in the NPRM.

II. Summary of the NPRM.

In its NPRM, the Commission proposed to adopt a wide-area licensing scheme for all exclusive, non-nationwide paging channels, based on pre-defined service areas. See NPRM at ¶ 19. The Commission stated its belief that Major Trading Areas ("MTAs") are the most appropriate geographic service areas for paging systems, and invited comment on this conclusion. Id. at ¶¶ 33-36.

The NPRM recognized that an "important issue" raised by its geographic licensing proposal is the potential treatment of incumbent paging operators. Id. at ¶ 37. The NPRM proposed allowing incumbents either to continue operating under their existing authorizations, or

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[2] The Commission has granted Metrocall an additional six months to complete construction of its nationwide PCP networks on a "single count" transmitter basis. See Memorandum Opinion and Order in PR Docket No. 93-35, FCC 96-53, at ¶ 31 (released February 13, 1996) ("PCP Exclusivity Reconsideration").

to "trade in" their site-specific authorizations for a single system-wide license, with the geographic area demarcated by the service contours of the incumbent's existing contiguous sites operating on the same channel. Id. Incumbents would not be permitted to expand beyond their existing interference contours without the consent of the geographic licensee. Id. Modifications that do not expand the interference contours would be allowed without obtaining prior Commission approval. Id. at ¶ 39. The Commission also questioned whether incumbents should be allowed to make certain minor modifications, such as relocations, to preserve system viability, and under what circumstances, if any, incumbents should be allowed to expand into unserved areas without the geographic licensee's consent. Id. The Commission stated that it would encourage voluntary agreements between incumbents and geographic licensees, id.; and proposed to treat requests for the transfer of control or assignment of incumbents' facilities to the geographic licensee as presumptively in the public interest. Id. at ¶ 22. The NPRM also proposed that, where an incumbent fails to timely construct, discontinues operations, or otherwise has its license terminated, the area covered by that site-specific authorization automatically revert to the geographic licensee. Id.

The NPRM proposed that geographic licensees provide coverage to one-third of the population of their MTAs within three years of license grant, and coverage to two-thirds of the population within five years. Id. at ¶ 41. In the alternative, the NPRM proposed that a geographic licensee be permitted to elect to make a showing of "substantial service" to the MTA at five years; that election, and a statement as to how the licensee expects to make the "substantial service" showing, would be required at the three-year benchmark. Id. The Commission tentatively concluded that geographic licensees should be required to meet their

coverage benchmarks regardless of the presence of incumbents in their MTAs, and sought comment on the use of license cancellations or other sanctions for geographic licensees who fail to meet those benchmarks. Id. at ¶¶ 43-44. The Commission also proposed to dismiss all pending requests for "slow growth" extensions of construction deadlines. Id. at ¶ 42.

The NPRM also requested comment on the co-channel interference protection to be afforded incumbents. Id. at ¶¶ 46-56. Although the Commission proposed to retain existing rules for calculation of the service and interference contours of lower band RCC facilities, it proposed to revise the calculation of those contours for 931 MHz RCC channels from the current fixed radius method to an eight-radial contour method and mathematical formula. Id. at ¶¶ 48-51. In determining the appropriate formula to calculate 931 MHz contours, the Commission proposed to assume a median field strength of 47 dBμV/m for the service contour and a median field strength of 21 dBμV/m for the interference contour. Id. at ¶ 52. The NPRM further proposed to provide 929 MHz exclusive licensees with interference protection on the same basis as 931 MHz RCC licensees, and sought comment on how to treat shared PCP channels. Id. at ¶¶ 55-56.

The Commission proposed that there be no restrictions on eligibility for geographic licenses, but sought comment on such issues as the relationship between incumbent coverage of a service area and the value of that service area to newcomers, and whether incumbents should be permitted to form bidding consortia or joint ventures. Id. at ¶¶ 66-67. The Commission also requested comment on whether a spectrum aggregation limit would be appropriate for wide-area paging licenses, and if so, what that "cap" should be. Id. at ¶ 69. The Commission questioned the impact of a spectrum cap on the paging industry, and tentatively concluded that incumbents

should be allowed to bid for geographic licenses on any channel for which they are already licensed in the area. Id. at ¶ 70.

Finally, the Commission requested comment on competitive bidding procedures for paging auctions, including provisions for "designated entities." Id. at ¶¶ 75-138.

III. Geographic Licensing Is Appropriate For Paging, but Care Must be Taken to Preserve Existing Services.

Metrocall generally supports the concept of providing paging licensees with geographic service areas, and permitting them to make modifications within their geographic areas without the need for site-by-site licensing. Nonetheless, Metrocall respectfully submits that the Commission should carefully consider the impact of entirely revamping the licensing procedures for the mature, highly competitive paging industry. Metrocall disagrees with the FCC's broad conclusion that MTAs "best mirror the size and development of existing paging systems." Cf. NPRM at ¶ 34.

The Commission is correct in noting that the trend in paging systems has been towards wide-area, and in many cases nationwide, coverage. See NPRM at ¶ 21. Geographic licensing will allow paging licensees who obtain wide-area licenses greater flexibility to modify their systems, and reduce the costs associated with site-by-site licensing for wide-area systems. Because of the long history of site-by-site licensing for paging services, however, those developing wide-area systems do not necessarily fit neatly into pre-defined service areas.

For example, Metrocall provides wide-area coverage in the Northeast and Mid-Atlantic regions of the United States; its current service areas comprise parts of several MTAs, but in most cases do not "fill out" all of any single MTA. The following discussion may prove illustrative of the problems even a sizeable company like Metrocall could face under MTA

licensing.

A. A "Real World" Example of Paging System Size and Growth.

Attached hereto is a map depicting Metrocall's nationwide coverage (the white contours are Metrocall's licensed service areas). Metrocall has licensed facilities in approximately 840 U.S. cities, which comprise the top 100 Standard Metropolitan Statistical Areas ("SMSAs"). Customers in those cities can receive local, regional or nationwide Metrocall service.

As the Commission can see from Metrocall's coverage map, which is fairly typical of most nationwide paging companies, there are large geographic areas within each state served by Metrocall that are unlicensed, for sound business and service reasons. Paging companies build transmitters when customer demand dictates such expenditures; those sites are then "linked" together by satellite or other reasonable means. It simply would make no sense to blanket all of Louisiana with radio transmitters, for instance, if the bulk of the licensee's customers are located only in Baton Rouge and New Orleans.

As the attached coverage map demonstrates, the Commission's wide-area licensing proposal would require Metrocall (and similarly situated licensees throughout the country) to apply and bid for, and construct transmitters in, most MTAs. In some of those areas (for example, in the Northeast and in California), Metrocall already fully covers the major population centers in the MTA; there would be little opportunity for another entity to provide a viable wide-area service on one of Metrocall's assigned frequencies. The areas that are not covered are "open" for a reason: if customer demand had warranted development of an entire MTA, Metrocall and its fellow paging companies would have already done so.

already invested hundreds of millions of dollars in applying for licenses, building out systems, and operating those systems to provide services to tens of millions of subscribers. This industry provides jobs to hundreds of thousands of citizens, and by the services it provides to business subscribers, the paging industry has contributed to the efficiency and growth of numerous commercial enterprises nationwide. In crafting new licensing rules for paging services, it is imperative that the Commission not jeopardize the contributions to the American economy that this industry has already made.

A. The FCC Should Allow Qualified Incumbents to Obtain Wide-Area Licenses Without Competitive Bidding.

If the Commission chooses to adopt wide-area licensing rules, it would make little sense to make available for auction any frequency in any MTA (or other geographic area) where an incumbent on that frequency is providing such substantial service that any other bidder would be unable to meet whatever coverage benchmarks the Commission ultimately adopts. Conducting auctions imposes costs on both the Commission and applicants; those costs should not be imposed without reason. Moreover, the Commission has a statutory obligation to avoid creating mutually exclusive situations. See 47 U.S.C. § 309(j)(6); see also, Third Report and Order in GN Docket No. 93-252, PR Docket No. 93-144, and PR Docket No. 89-553, FCC 94-212, at ¶ 322 (released September 24, 1994) ("Third CMRS Order"). To the extent that this NPRM appears to promote competing applications for frequencies that are already congested in designated licensing areas, that would encourage mutually exclusive filings for no valid public interest reason, and insert unnecessary delays into the licensing process, contrary to the express language of Section 309(j) of the Communications Act of 1934, as amended (the "Act").

Consequently, Metrocall suggests that where an incumbent operator's system on a

B. The Commission Should Consider BTA Licensing for Paging.

Metrocall sees some advantages to licensing on an MTA basis; to the extent that an incumbent is able to obtain MTA licenses for the frequencies on which it operates, that incumbent will have substantial latitude in system design and build-out over a large geographic area. Nonetheless, Metrocall is not convinced that MTA licensing across the board would be superior to Basic Trading Area ("BTA") licensing.

It is the BTAs that "best mirror" the size and development of existing paging systems, not MTAs. In many BTAs, an incumbent may already substantially or entirely cover the BTA on one or more frequencies. Licensing by BTAs would conserve the Commission's resources by eliminating the need to hold auctions for such areas that are already constructed, while leaving open the surrounding BTAs where the incumbent presence is less substantial. Smaller licensing areas may also provide paging operators with flexibility to bid on areas that they are interested in serving, without having to also pay for, and build out, large geographic territories for which there is little or no customer demand. Finally, the smaller BTAs would provide smaller paging operators with greater opportunities to participate in auctions; that would not be the case with MTAs.

IV. Existing Paging Systems Must be Protected, and Licensees Should be Permitted to Retain Flexibility in Modifying their Systems.

Whatever licensing areas the Commission adopts, Metrocall urges the Commission not to arbitrarily (and unlawfully) deprive paging incumbents of the substantial investments they have made in their systems. Paging is the most highly-developed, competitive industry for which the Commission has proposed wide-area licensing and auctions to date. The paging industry has

particular frequency already covers an area encompassing two-thirds of the population of the designated licensing area (either BTA or MTA), or two-thirds of the total geographic area, the Commission should issue that incumbent a wide-area authorization for that frequency. No other entity will be able to institute viable wide-area paging service on that frequency in that licensing area; it therefore makes no sense to put the Commission and the incumbent through the administrative burden of the competitive bidding process.

When the Commission adopts a Report and Order in this proceeding, it should establish a deadline by which incumbent operators are to submit their requests for such wide-area authorizations; those requests can be placed on Public Notice to provide parties in interest the opportunity to file petitions to deny. Unless a petitioner with legal standing can demonstrate, under statutory standards for a "prima facie" case, that an incumbent is not providing the coverage that it claims, the incumbent's request should be granted. See, e.g., Sioux Valley Rural Television, Inc., DA 94-94 (released February 2, 1994), citing Astroline Com. Co. Ltd. Partnership v. FCC, 857 F.2d 1556, 1561 (D.C.Cir. 1988) (petition to deny must set forth specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest; only if that showing is made must the Commission then consider whether a substantial and material question of fact has been presented).

B. Rule Changes That Would Decrease Incumbents' Interference Protection Rights Are Unlawful.

Incumbent licensees that do not currently qualify for such wide-area authorizations on their assigned frequencies, or who are unsuccessful in bidding for their frequencies in a particular licensing area, should be permitted the option of either retaining their site-by-site authorizations, or exchanging those authorizations for a single "blanket license" covering their

existing interference contours. Incumbents must be protected at least to the extent of their then-existing interference contours, as calculated under the current rules.

Metrocall strongly objects to the FCC's proposed changes concerning the calculation of service and interference contours for 931 MHz and 929 MHz. See NPRM at ¶ 52. Those proposed changes will substantially decrease the current level of interference protection afforded licensees in these bands, by decreasing licensees' protected contours by as much as 25 km. To so modify existing licenses, without affording the affected licensees a hearing to determine the public interest in the particular case, is arbitrary, capricious, and in violation of Section 316 of the Act. See 47 U.S.C. § 316. The interest of a licensee that has constructed and operated its station in good faith is "more than a mere privilege;" both the Act and basic tenets of administrative due process require that that protected property interest not be divested by government fiat. See, e.g., L.B. Wilson, Inc. v. FCC, 170 F2d 793, 798 (D.C.Cir. 1948).

After substantial public comment, and a two-year regulatory process, the current rules for calculating 931 MHz contours were recently adopted in the Commission's Part 22 Rewrite Order. Absent compelling reasons to change those carefully-crafted rules, the Commission should not modify them, particularly where doing so would substantially impair the investments that paging licensees have made in their systems in reliance upon those rules.

C. Incumbents Should be Permitted Some Expansion Rights.

Incumbents should also be permitted to request expansion of their interference contours into the adjacent geographic licensing area in some circumstances. While the bidder for a geographic license is certainly entitled to whatever value it can get out of the license area it has paid for, some "safety valve" is necessary to ensure that incumbents who do not win at auction

are not driven out of the market, or precluded from servicing customers in "fringe" areas. The need for such a "safety valve" is no less acute for larger companies such as Metrocall than for small ones; a paging company providing services throughout a multi-state region, with "corridor" service between major cities, could find its regional network effectively cut in half should it fail to obtain one of the geographic licensing areas within that region.

Consequently, Metrocall respectfully submits that incumbent licensees should be permitted to make permissive modifications to their systems that would not be deemed "initial" applications under the current Part 22 rules. The rules governing 929 MHz exclusive systems should be conformed to those standards to allow for permissive modifications. Additionally, a number of commenters on the Commission's "Interim Licensing Proposal" in this proceeding have suggested that, during the pendency of this proceeding, incumbents on 929 MHz exclusive channels be permitted to relocate or add stations at any point within forty miles of one of the incumbent's existing co-channel transmitters. See, e.g., Comments of the Personal Communications Industry Association on Interim Licensing Procedures at 32; Joint Comments on Interim Licensing Proposal at 14. Metrocall suggests that this forty-mile standard be adopted as the definition of "permissive modification" by an incumbent operator on all exclusive paging frequencies. That approach would limit the amount that an incumbent could encroach upon the adjacent licensing area, but would still provide incumbents with room to expand or modify their systems in response to changed conditions.

D. Agreements Between Incumbents and Wide-Area Licensees Should be Encouraged.

The Commission has stated that it will encourage voluntary agreements between geographic licensees and incumbent operators, including assignments or transfers from

incumbents to geographic licensees. See NPRM at ¶¶ 22, 39. Metrocall suggests that the Commission allow incumbents flexibility in entering agreements with geographic licensees, and not limit its "encouragement" to interference agreements or auction-winner buyouts of existing operators. Incumbents should be free to negotiate to purchase all or part of the wide-area authorizations covering the regions in which they are operating, as well as to enter into joint ventures, intercarrier agreements or other arrangements that suit the mutual business needs of the parties. In particular, where the geographic licensee is itself an incumbent operator (as the Commission has acknowledged is likely to be the case in many areas), the Commission should afford that geographic licensee and other co-channel incumbents wide latitude in reaching agreements. In such circumstances, where all the parties have already made substantial investments in constructing facilities and providing service to the public, there is little threat of "greenmail" payments or unjust enrichment. The FCC should allow those licensees to enter into such agreements as the market dictates.

V. Modifications to the FCC's Proposed Coverage Requirements are Necessary.

The NPRM proposed that geographic licensees provide coverage to one-third of the population of their MTAs within three years of license grant, and coverage to two-thirds of the population (or "substantial service") within five years. Id. at ¶ 41. Metrocall respectfully submits that these arbitrary benchmarks, if imposed in conjunction with MTA-sized licensing areas, will serve little purpose other than to substantially increase the costs to paging carriers. As the Commission has noted, there is little history of warehousing in the paging industry, and, under a competitive bidding regime, licensees are unlikely to bid for more channels than they can use. See, e.g., NPRM at ¶ 69. Paging licensees have generally not requested new

frequencies or service areas without legitimate need, and have continuously employed new technologies to increase the efficiency of operations on their assigned spectrum.

Given its track record, this industry can be trusted to build-out wide-area authorizations based upon market demands; there is little to be gained by imposing an artificial regulatory timetable on the construction of wide-area paging systems. Moreover, the costs of building out over an MTA will be very high; for smaller companies, or for larger companies whose ultimate expansion plans encompass areas in several MTAs, the costs of complying with the Commission's coverage benchmarks may well be prohibitive. While some showing of "substantial service" or other benchmark may be appropriate in applying for renewal of a geographic license, Metrocall submits that requiring such showings during the course of the license term imposes unnecessary costs upon licensees.

If the FCC adopts BTA, rather than MTA, license areas, Metrocall could support the three and five-year benchmarks proposed in the NPRM, with the following refinements. First, three years is a substantial period of time for non-auction-winning incumbents to wait for a geographic licensee to fail to meet a coverage benchmark, if those benchmarks cannot be met. Metrocall proposes that if, at the end of one year, the geographic licensee is not providing service with at least one transmitter within the license area, in full compliance with the Commission's mileage separation and interference protection rules, the geographic license should be automatically terminated. Under this proposal, incumbents could count the transmitters they have already installed. With regard to new entrants, if the licensing area in question is so crowded with co-channel incumbents that a "newcomer" geographic licensee cannot install and operate a single transmitter within a twelve-month period, there is little point

in permitting that geographic licensee to restrict, for an additional two years, the expansion of incumbents who might actually be able to use what little "white area" remains in the licensing area, to provide service to the public.

Where an incumbent licensee is awarded the wide-area authorization, that incumbent should be permitted to perfect its wide-area authorization as soon as it meets the applicable benchmark. For example, if an incumbent already covers an area sufficient to encompass one-third of the BTA's population at the time it is awarded a "BTA authorization," the incumbent should be permitted the flexibility of certifying at that time (or any time thereafter) that it has met its "three-year benchmark." To require the licensee to wait until the third anniversary of its license grant does not appear to serve any purpose; if the licensee wishes to dispense with its reporting requirements promptly, the Commission should permit it to do so.

Metrocall concurs with the Commission's tentative conclusion that, if coverage requirements are imposed, wide-area authorization holders should be held to their coverage benchmarks despite the presence of incumbents in their geographic areas. Although Metrocall does not believe that there is much threat of spectrum warehousing in the paging industry, it recognizes that the award of a geographic license to one party in an area will severely limit, if not entirely curtail, the ability of co-channel incumbents to expand. Bidders for geographic licenses should be fully aware that there will likely be co-channel licensees within their licensing areas; if the incumbent presence in an area is so great that the geographic licensee cannot timely build out a system, the frequency should be made available to the incumbent paging operators for their legitimate needs.

Nonetheless, wide-area authorization holders should be afforded the flexibility to

partition their geographic service areas with incumbent operators or new entrants. If the geographic licensee lacks the resources to build out all of the licensing area, or if it has no demand for service in portions of the licensing area, the geographic licensee should be permitted to assign a "partitioned service area" to an incumbent operator in or adjacent to those portions of the licensing area, or to any third party interested in building and operating a smaller paging system. The wide-area licensee's coverage requirements, if they have not already been met, should thereafter be based upon the "partitioned service area" that it has retained.

To the extent that a wide-area licensee does not meet the three-year and five-year coverage benchmarks, its geographic area license should be reduced to the area constructed. Because that licensee may have made substantial investments in attempting to meet those benchmarks, and because there may be subscribers relying upon the services that licensee is providing, the licensee should be permitted to continue to operate its constructed sites, and should receive the same interference protection for those sites as received by non-geographic-licensee incumbents.

VI. Pending Exclusivity and Slow Growth Requests Should be Processed under Existing Rules.

Metrocall objects to the Commission's proposals to dismiss pending "slow growth" construction extension requests, pending exclusivity requests, and rule waiver requests previously filed by 929 MHz licensees. Numerous licensees filed such requests in the more than two years since the Commission's adoption of the 929 MHz exclusivity rules. Many of those licensees have expended substantial funds building out their systems, or have been waiting patiently for exclusivity decisions, in good faith reliance on the Commission's existing 929 MHz exclusivity rules. The issues of local and regional exclusivity, and of extended construction

periods within which to build out regional systems, are hardly "moot" to the licensees who have invested their efforts and money into those systems, and who may now find their investments lost.

The Commission states that "numerous requests for conditional and permanent [929 MHz] exclusivity are pending before the Commission" and, that "all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot." NPRM at ¶ 148. This is not an accurate restatement of the 929 MHz exclusivity rules, and, it is far from clear whether those requests would be "moot" under the NPRM's proposals.

First of all, there is no procedure under the rules for requesting "permanent" exclusivity. Until now, the FCC has left 929 MHz exclusivity decisions with the applicable frequency coordinator, and, so long as construction deadlines were timely met, the recipient of a PCIA "exclusivity" coordination was entitled to assume that it automatically had an "exclusive" license. If that is not what the FCC now intends, it will have to afford these "conditional exclusivity recipients" fair notice and an opportunity to "perfect" their PCIA grants.

In addition, there are many recipients of PCIA coordination decisions who have been waiting for FCC grants of slow growth or other rule waiver requests; they could not commence constructing their facilities until knowing whether the FCC would grant the requests. It would be entirely unfair for the FCC, after ignoring those requests for two years, to deprive those good faith applicants of exclusivity protection prior to initiating spectrum auctions. Obviously, those applicants have not constructed their facilities, and presumably would not be granted "incumbent" protection by the FCC. Administrative fairness dictates that their applications be processed before the FCC auctions off the paging channels.

For the Commission to use its own inaction (in the case of some requests, a period of more than two years) as a reason to deprive those licensees of their investment is grossly unfair. The proposals in the NPRM, unless they ensure that licensees who have constructed their exclusive systems, or licensees who are building out under "slow growth" schedules and/or under the outstanding construction periods on their licenses, are granted the exclusivity they have earned under the rules, would unlawfully modify their licensed stations without the necessary prior notice and opportunity for hearing, in some cases to the point of depriving them of their investment in their systems.

In short, all licensees with pending slow growth and exclusivity requests should be given at least some period of time to perfect their eligibility for exclusivity prior to the acceptance of applications for wide-area authorizations.

VII. Restrictions on Eligibility would Disserve the Public Interest.

The NPRM proposed that there be no restrictions placed upon eligibility for wide-area authorizations, and that incumbents and newcomers be allowed to apply on the same terms. See NPRM at ¶ 67. Metrocall generally concurs that their should be no restrictions on eligibility for geographic licenses, particularly to the extent that such restrictions could hinder expansion by existing licensees. Nonetheless, the Commission should recognize that there are many areas in which no newcomer could institute a viable, wide-area service. Certainly, the greater the coverage being provided by an incumbent operator on a given frequency in a given area, the less that area would be worth to any other applicant with a legitimate interest in providing paging services. Indeed, as Metrocall has suggested, where an incumbent operator already has a substantial presence in a geographic area, it would be futile to accept competing applications for

that incumbent's frequency in that area, and the incumbent should be granted a wide-area license.

VIII. Spectrum Caps would Disserve the Public Interest.

Metrocall strongly opposes spectrum aggregation limits for paging licenses, and finds the Commission's statement that a cap "may be necessary to protect competition in the paging market" to be highly ironic. See NPRM at ¶ 70. The paging market is perhaps the most competitive of all telecommunications markets, with multiple service providers in nearly all areas. The paging industry developed to this state without arbitrary restrictions on the number of channels that an individual licensee may hold. If there is any threat to competition in the paging market, it will come not from large companies bidding for more than a predetermined number of frequencies, but from spectrum auctioning generally.

If the auctions held to date are any guide, competitive bidding exponentially increases the costs of obtaining authorizations. See, e.g., "Small Firms Get Tangled in Phone Service Bids", Wall Street Journal, March 4, 1996 (concerning the unexpectedly high bid amounts for the broadband PCS C-block auction). Even sizeable companies such as Metrocall can ill-afford to spend millions of dollars on spectrum for which they have no immediate need. Paging operators will have to expend more than sufficient funds simply to obtain the spectrum they need to carry out their business plans; few if any licensees would have sufficient additional resources to bid for all or most of other the frequencies in a market. For the Commission to substantially raise the capital requirements for entry and expansion in the paging industry, and then suggest that the "protection" of competition in the paging industry may require a government-imposed spectrum cap, falls somewhat shy of judicial and statutory standards of rational decision-making.

Moreover, the Commission's proposal to allow incumbents to obtain geographic licenses

for any channel(s) on which they are licensed in the particular geographic area is inadequate to protect incumbents, because it does not allow incumbents the flexibility to seek geographic authorizations on their assigned channels in adjacent geographic areas. Hence, such a limited exception to a spectrum cap would artificially inhibit incumbents' ability to seek geographic licenses in adjacent areas which may be necessary to their legitimate expansion plans. As the Commission itself has noted, warehousing simply has not been much of an issue in the paging industry, and paging carriers are subject to competition in all markets. See NPRM at ¶ 69. To impose a spectrum cap that would restrict licensees' abilities to meet public demand, where there are no anti-competitive conditions in the paging market that warrant a government-imposed cap, would be arbitrary, capricious, and contrary to the public interest.

IX. Competitive Bidding Design.

Metrocall urges the Commission, in designing competitive bidding rules for paging services, to continuously bear in mind that this is not virgin spectrum, nor even under-utilized spectrum, but spectrum that is being intensively used by existing businesses. The Omnibus Budget Reconciliation Act of 1993's (the "Budget Act") amendments to the Act require that the Commission consider certain criteria before utilizing auctions. The Commission "shall seek to promote" the Congressional objectives of "rapid deployment of new technologies, products and services;" "promoting economic opportunity and competition;" "recover[ing] for the public ... a portion of the value of the public spectrum resource;" and "efficient and intensive use of the electromagnetic spectrum." See 47 U.S.C. § 309(j)(3). The Commission should pay particular heed to those objectives when it is considering auctions for an existing service, upon which tens of millions of subscribers rely, to ensure that existing services, the current level of competition

in the market, and current spectrum-efficient uses, are not impaired simply to obtain auction revenues. Cf. 47 U.S.C. § 309(j)(7)(A) (in designing licensing rules, the Commission may not base a finding of the public interest on the expectation of auction revenues).

A. Auctions should be Limited to Legitimate Mutually Exclusive Situations.

Rather than stimulate false demand, and encourage application mills to lure people into paging auctions, it would be better to hold auctions for paging authorizations only when legitimate mutual exclusivity arises. The existing Part 22 licensing rules could readily be adopted to accommodate wide-area licensing.

Any party interested in obtaining a particular MTA or BTA authorization could file the required application (either the FCC Form 175 "short form" or the FCC Form 600, whichever the Commission prefers); that application would then be placed on a Public Notice. Interested parties would then have thirty days within which to file a competing "short form" application.[3] If one or more competing applications are filed, the Commission would release a Public Notice announcing the date and time of the commencement of an auction to resolve that mutual exclusivity. Only the parties to the "MX" would be eligible to bid on the license in question. The bidding could be accomplished by a streamlined auction method such as oral outcry (which could be done telephonically) or sealed bid; however, even electronic bidding would not be so complex if the auction in question involved only one authorization and a limited number of competing applicants.

This approach would more accurately reflect the development of paging systems, by

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[3] This is consistent with the thirty-day "MX" period adopted under the Part 22 Rewrite. See 47 C.F.R. § 22.131(c)(3)(iii).

allowing interested parties to wait until their is a demand for paging services in a geographic area before applying for that area. This approach will thus guard against unnecessary expenditures by applicants and conserve FCC resources, by holding auctions only when two or more parties legitimately file mutually exclusive applications. This approach should also ultimately recover the greatest value for the public (and generate the most federal revenues), because auctions will be held only when there is legitimate demand for a particular license.

Metrocall submits that any other approach would be entirely impractical for paging companies, their advisors, and the FCC. As the Commission has noted, if its proposed simultaneous multiple round auction plan is employed, there would be over 1,800 MTA license auctions for 931 MHz channels alone. Few paging companies have the personnel or resources to keep up with such an enormous number of simultaneous auctions. A simultaneous auction of that size would be an administrative and financial nightmare, for the Commission and for all bidders. And unlike auctions for new services, license grouping for competitive bidding purposes simply may not be possible in paging without arbitrarily favoring some market participants over others.

The far better alternative is to utilize existing cut-off rules for wide-area authorizations. That way, the market, rather than arbitrary administrative edict, will determine when authorizations should be auctioned. That result is fully consistent with the Budget Act and with common sense.

B. The Commission Should not Restrict Legitimate Transactions <u>During or After Auctions</u>.

The Commission also proposed to apply its anti-collusion rules to paging auctions, to prohibit amendments to short-form filings that result in a change of control of the applicant, and